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# Legal Norms' Distinctiveness in Legal Transplants and Global Legal Pluralism

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## **Legal Norms' Distinctiveness in Legal Transplants and Global Legal Pluralism**

**By Toby S Goldbach\***

### **I. INTRODUCTION: TRANSFERS AND CLASHES**

“Law is on the move.”<sup>1</sup> States transplant foreign rules or procedures to improve commercial activity or as part efforts to harmonize political and legal systems.<sup>2</sup> Foreign laws are also used as instruments in development projects, where increasingly these projects emphasize legal norms such as transparency or accountability as ends in themselves.<sup>3</sup> This is the case in projects that promote the Rule of Law or democratic freedom as the key to progress<sup>4</sup> but also with the rise of constitutionalism as an organizing concept or archetype in legal thought.<sup>5</sup> Yet scholars have historically described deep connections between legal institutions and national

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\* JSD Candidate, Cornell University. Much of the thinking in this paper follows on research and ensuing conversations with Peter Katzenstein and Benjamin Brake and I am grateful to them for their insights and ideas. Any errors are solely my own. Thank you to Odette Lienau and Mariana Mota Prado for helpful comments and suggestions on this early draft.

<sup>1</sup> John H. Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement*, 25 AM. J. COMP. L. 457 (1977)

<sup>2</sup> See generally THEORY AND PRACTICE OF HARMONIZATION (Mads Andenas and Camilla Baasch Andersen, eds. 2011); Anne-Marie Slaughter & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, in INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 457 (Beth A. Simmons & Richard H. Steinberg, eds. 2006).

<sup>3</sup> Ronald J. Daniels, Michael J. Trebilcock & Lindsey D. Carson, *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, 59 AM. J. COMP. L. 111 (2011); MICHAEL J. TREBILCOCK & RONALD J. DANIELS, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* (2008);

<sup>4</sup> Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHILOSOPHY & PUB. AFF. 315 (2004); David Kennedy, *The 'Rule of Law,' Political Choices, and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (David M. Trubek & Alvaro Santos eds., 2006).

<sup>5</sup> Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000* in THE NEW LAW AND ECONOMIC DEVELOPMENT, supra note 4; César Rodríguez-Garavito, *Toward a sociology of the global rule of law field: neoliberalism, neoconstitutionalisms, and the contest over judicial reform in Latin America*, in LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION (Yves Dezalay and Bryant G Garth eds., 2011); and Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development* in THE NEW LAW AND ECONOMIC DEVELOPMENT, supra note 3.

identities,<sup>6</sup> or between legal culture and state history.<sup>7</sup> National identities are thought to be reflected in how states administer justice – in their courts and justice procedures.<sup>8</sup> The transnational movement of legal norms is thus “a subject of profound political importance and controversy.”<sup>9</sup>

This paper examines the transnational movement of law and legal pluralism in the transnational domain in order to play with a specific question: whether legal norms are distinctive or whether there is a distinctive way that legal norms operate in practice. It engages with the International and considers two empirical domains or sets of disciplines: Legal Transplants and Global Legal Pluralism. Both reflect on the relationships between multiple overlapping legal orders, and between “donors” and “recipients” in interactional legal practices. These disciplines point to moments of problem-articulation, periods of translation, and practices of acceptance and recognition. The paper suggests preliminary conclusions about the distinctiveness of legal norms, specifically that there is an aesthetic to law reform or legal instrumentalism and to a practice of recognition between overlapping normative options, both of which generate a particular kind of fidelity to law and legal norms.

The paper is an initial attempt to work through three broad themes that will ground a larger project. The first is to bridge international and domestic domains as sites of interaction by focusing on the transnational movement of law and legal transplants. Cotterrell aptly writes:

To invoke an idea of transnational law is to suggest that law has new sources, locations, and bases of authority. Adding “transnational” to “law” is like adding a question mark: querying modern Western jurisprudence’s state-centered understanding of law. It is also to query whether ideas and methods in international law need revising, to accelerate the ongoing development of this field away from its traditional focus on the relations of states, toward a broad concern with the regulatory problems of international society.<sup>10</sup>

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<sup>6</sup> Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1991); Laura Nader, *The ethnography of law* (1965).

<sup>7</sup> James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 *YALE L.J.* 1279 (2000).

<sup>8</sup> Neil Vidmar & Valerie Hans, *American Juries: the Verdict* (2007); Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (1993).

<sup>9</sup> Benjamin Brake & Peter J. Katzenstein, *The Transnational Spread of American Law*, APSA 2011 Annual Meeting Paper. Available at SSRN: <http://ssrn.com/abstract=1901131>

<sup>10</sup> Cotterrell (2012), at 502-503.

Scholars, especially International Relations (“IR”) scholars have identified structures of global governance beyond domestic legal institutions and the legalizing of international institutions as relevant objects of study when engaging with the topic of law in the international domain.<sup>11</sup> In these and other research projects there is often a separation between domestic (municipal) and International Law (“IL”), which is conceptually neat but unrealistic in the legal world. For example, Private International Law, which encompasses commercial disputes that cross national boundaries, is addressed in international dispute resolution institutions such as the WTO Dispute Settlement Body (e.g. *US – Import Prohibition of Certain Shrimp*, 1998). However, important cases with international implications are still being decided in domestic courts (*Filanto Spa v Chilewich International*, 1992; *Kiobel v. Royal Dutch Shell*, 2013). This paper follows other efforts to bridge the domestic and international in thinking about law’s relevancy.<sup>12</sup> Here there are opportunities to examine the various ways that law interacts with and impacts on the international, for example in “transnational communal networks,”<sup>13</sup> global legal pluralist orders<sup>14</sup> and transnational legal orders.<sup>15</sup>

One of the main concerns for IR scholars is why states comply with IL when there is no supra-national enforcement mechanism. As a legal domain where obligation and enforcement is uncertain, IL provides an opportunity to think about whether and how law exerts a “compliance

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<sup>11</sup> GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION (Miles Kahler & David A. Lake, eds. 2003); Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, & Duncan Snidal, *The Concept of Legalization*, 54 INT’L ORG. 401 (2000); JUDITH GOLDSTEIN, LEGALIZATION AND WORLD POLITICS (2001).

<sup>12</sup> Peer Zumbansen, *Transnational Law*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 738, 742 (Jan Smits ed., 2006).

<sup>13</sup> Roger Cotterrell, *What Is Transnational Law?*, 37 LAW & SOC. INQUIRY 500 (2012).

<sup>14</sup> Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225 (2009); Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

<sup>15</sup> Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229, 229-230 (2012); Terence Halliday & Gregory Shaffer, *Transnational Legal Orders* (May 2012) (unpublished paper, presented at the International Conference on Law and Society, Hawaii, June 8, 2012, on file with author) (arguing that industry invention, transformations in national economies, or even changes in leadership of international organizations are all factors in the transformation of transnational legal orders) and *see generally* TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE (Gregory C. Shaffer, ed. 2013).

pull.”<sup>16</sup> In other words, the way law “function(s) in a horizontal normative order such as international society”<sup>17</sup> provides clues as to the distinctiveness of legal norms. Similarly, legal transplants and global legal pluralism, as sites of multiplicity and hybridity in law, are also examples of contingent compliance or obligation to legal systems. Legal transplants and pluralist legal orders are sites of clashes, indeterminacy, multiple overlapping claims to legitimacy, and places where norms are sources of “resistance, contestation and adaptation.”<sup>18</sup> Here legal norms are “in jeopardy”, not in the sense that there is concern about whether or not legal norms can be enforced.<sup>19</sup> Instead, contingency is implicated in fragmentation of legal regimes and multiple overlapping sometimes contradicting choices for legal rules and institutions. “Juristic innovation” in interpreting and managing legal complexity<sup>20</sup> will have something to say about whether there is anything particular about legal work and how legal norms are distinctive.

The second broad theme is to begin to see judges as an object of study not in their capacity as decision makers but as part of an epistemic community<sup>21</sup> that is involved in developing and institutionalizing new court procedures or methods for dispute processing. Examples of the ways that judges are involved in court reforms include the use of new “problem-solving courts”<sup>22</sup> or “therapeutic judging,”<sup>23</sup> (e.g. domestic violence courts, conciliation family courts), or judicial involvement in promoting lay participation in criminal trials.<sup>24</sup> This theme takes as its starting point the phenomenon of legal pluralism or fragmentation of law generally, and of courts and court procedures more specifically.<sup>25</sup> Under this view, what happens at court is no longer typified

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<sup>16</sup> Jutta Brunnée & Stephen J. Toope, *Constructivism and International Law*, in *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012)

<sup>17</sup> Jutta Brunnée & Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* 9 (2010).

<sup>18</sup> Berman (2009), at 230-231.

<sup>19</sup> Cotterrell (2012), at 516.

<sup>20</sup> Cotterrell (2012), at 504.

<sup>21</sup> Haas

<sup>22</sup> See e.g. Greg Berman, Greg, John Feinblatt, & Sarah Glazer, *Good Courts: The Case for Problem-Solving Justice*, (2005).

<sup>23</sup> See e.g. Bruce J Winick & David B. Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (2003).

<sup>24</sup> See *infra* section

<sup>25</sup> Roger Cotterrell, *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (2006)

by a single type of procedure and specialized courts with different types of judicial functions now feature in multiple jurisdictions.<sup>26</sup>

The paper intermittently relies on examples of judges involved in the international domain. These examples highlight the legal and political implications of judicial activities that are not decision-making *per se*. There are numerous sites where judges engage in or are ‘active’ in shaping law. For example, the domestic judiciary acting as a major branch of government currently features as the foundational thinking in Law and Development programs.<sup>27</sup> The World Bank’s website announces that Justice Systems Matter for Development. “Justice institutions are important in determining the extent to which these societal expectations are realized...” They have “specific instrumental roles” in “fostering private sector growth” and in “ensuring compliance of private sector actors and citizens with legal and regulatory frameworks.”<sup>28</sup> Moreover, paradoxical visions of judges domestically and internationally point to a fundamental underlying self-doubt about law that is currently circulating in scholarship and the legal community. Judges and courts are thus sites of investigation in a project about whether legal norms are distinctive because they embody concerns about law as a tool for social change.<sup>29</sup>

The third move is to shift the focus in thinking about distinctiveness of legal norms away from definitional perspectives to practice or interactional explanations. This is analogous to Robert Borofsky’s recommendation to focus on social performance rather than merely on intellectual content in understanding knowledge.<sup>30</sup> Borofsky argues that to focus on content at the expense of social performance neglects important aspects of what people know. Similarly,

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<sup>26</sup> Mitchel de S -O -L'E Lasser, *Judicial Transformations: The Rights Revolution in the Courts of Europe* (2009)

<sup>27</sup> Bryant G Garth, *Law and society as law and development*, 37 LAW SOC. REV. 37:305, 306 (comparing the present focus with past Law and Development programs which focused on lawyers, legal education and corporate law systems); Duncan Kennedy (2006), *supra*.

<sup>28</sup> The World Bank has spent more than \$850 million on funded projects “dedicated specifically to assisting developing countries in establishing efficient and effective justice systems “ in particular “focused primarily on improving the performance of courts”.

<sup>29</sup> On doubting the Law and Society movement, Robert Dingwall concludes that “The result of thirty years mainly doing empirical work on topics of policy or public relevance is a view that none of it really matters very much. At best, scholars are conceptive ideologists... Research is normally a legitimation for what decisionmakers have already decided to do.” Robert Dingwall, *A Stranger at the Table: Reflections on Law, Society, and the Higgs Boson* 36 LAW & SOC'Y REV. 29 (2002).

<sup>30</sup> Robert Borofsky, *On the Knowledge and Knowing of Cultural Activities*, in ASSESSING CULTURAL ANTHROPOLOGY (Robert Borofsky ed., 1994).

the paper takes a kind of anthropological turn to an IR conversation – that of the distinctiveness of legal norms.

The paper proceeds in three sections. The next section briefly reviews scholarship on legal norms in the international domain in order to set the stage for moving to the *transnational* and *transactional* to look for legal norms' distinctiveness. The third and fourth sections look at relational accounts in legal transplants and global legal pluralism respectively. These sections build on an understanding of a practice of legality and collaborative norm-making and try to identify the types or modes of collaborative norm-making as they manifest in competitive and contingent legal spaces. The paper concludes with tentative claims about the distinctiveness of legal norms.

## II. THE PROBLEM OF LAW IN THE INTERNATIONAL DOMAIN

### A. Legal Norms and Obligation

Two related questions or concerns often trouble legal scholars interested in the international domain. First, is the broad jurisprudential question: if the definition of law is rules given by the sovereign to persons under its command,<sup>31</sup> then is “law between nations” really law and part of a legal system, or is it merely an honor system of guided morality?<sup>32</sup> With the proliferation of international treaties, legalized international organizations, this question has lost potency and consequently receives less attention than the second more functional question. The second perennial question subsists: what motivates states to abide by legal commitments? How does law create obligation and bind states in the absence of a centralized overarching authoritative body that can enforce it?<sup>33</sup> In other words, is there a *particular* way that law generates internalized

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<sup>31</sup> Austin, Hart, Kelsen

<sup>32</sup> Jack Goldsmith, & Daryl Levinson, Law for States: International Law, Constitutional Law, Public Law, 122 HARV. L. REV. 1791, 1822 (2009); Joshua Kleinfeld, Skeptical Internationalism: A Study of Whether International Law is Law, 78 FORDHAM L. REV. 2451 (2009-2010) (“There is an intuition that international law is not actually law at all, that though it goes by the name of “law” it is in fact closer to politics, or moral exhortation, or aspiration, or pretense.”)

<sup>33</sup> Ian Hurd, Legitimacy and Authority in International Politics, 53 INT'L ORG. 379 (1999)

compliance or obedience?<sup>34</sup> It is within this second set of questions where legal scholars engage in interesting ways with questions about how law works or whether legal norms are distinctive.

International legal scholars address functional, causal curiosities to find the source of what motivates and precipitates compliance with IL.<sup>35</sup> Several scholars provide detailed accounts of IR theory and the impact of legal commitments in guiding state behavior<sup>36</sup> and this does not need to be reviewed here. It will suffice to say that at a most general and superficial level, IR Realists who believe that power and the distribution of material capabilities instructs states in an anarchic world<sup>37</sup> are not overly concerned with IL. On the other hand, law finds advocates in liberal and neo-liberal theories,<sup>38</sup> which tend to be more interested in ideas, interests and international organizations that enable and constrain state behavior.<sup>39</sup> A third possibility for law internationally, taken from constructivist theories in IR, is that legal norm diffusion and the socializing effects of norms enable, shape and constrains state behavior.<sup>40</sup> Constructivist theories

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<sup>34</sup> Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L. J. 2599 (1997).

<sup>35</sup> ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998); R. O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L. J. 487 (1997); Ian Hurd, *Legitimacy and Authority in International Politics*, 53 INT'L ORG. 379 (1999). International Relations (IR) scholars concerned with the relations between states ask the following set of questions: Do states comply with treaties and international organizations because compliance saves on transaction costs associated with having to renegotiate treaties? Are states concerned with reputational stakes and other instrumental self-interested rational action? Do states merely use law to pursue their own interests (instrumental optic) or is there some causal normative force to law or legitimacy? Are there structural ideational and institutional legal effects, such that law constrains state behavior by forming the basis on which actions must be justified?

<sup>36</sup> Keohane (1997); Brunnée & Toope (2012), *supra*; Peter J. Katzenstein, Robert O. Keohane & Stephen D. Krasner, *International Organization and the Study of World Politics*, 52 INT'L ORG. 645 (1998); Abbott et al (2000).

<sup>37</sup> John J. Mearsheimer, *The Tragedy of Great Power Politics* (2001); Kenneth N. Waltz, *Theory of International Politics* 93 (1979) ("Anarchy entails relations of coordination among a system's units, and that implies their sameness...") and in contrast to the domestic system, the international-political system contains like units (e.g. states) that are not differentiated by the functions they perform); HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977).

<sup>38</sup> Robert Jervis, *Realism in the Study of World Politics*, 52 INT'L ORG. 971 (1998).

<sup>39</sup> Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); Lisa Martin & Beth Simmons, *Theories and Empirical Studies of International Institutions*, 52 INT'L ORG. 729 (1998).

<sup>40</sup> Brunnée & Toope (2012); Martha Finnemore & Stephen J. Toope, *Alternatives to 'Leglization': Richer Views of Law and Politics*, 55 INT'L ORG. 743 (2001); Michael Barnett & Martha Finnemore, *The Politics, Power, and Pathologies of International Organizations*, 53 INT'L ORG. 699 (1999). The idea of the socializing effect of law is



claim that institutions, interests and identities are formed in relational settings that may be pre-structured or pre-constituted in ways that make them connected and somewhat indivisible. For example, anarchy in the international system does not exist apart from the practices that create structures of identities and interests.<sup>41</sup>

Constructivists challenge assumptions that interests are exogenously given and rationally pursued. Interests and identities are “socially constructed products of learning, knowledge, cultural practices and ideology.”<sup>42</sup> To speak of state interests or state preferences in understanding state behavior does not make sense without reference to “social facts” and the “irreducibly intersubjective dimension of human action.”<sup>43</sup> Agents and structures mutually constitute and it is through “interaction and communication [that] actors generate shared knowledge and shared understandings that become the background for subsequent interactions.”<sup>44</sup>

The source of IL’s influence is thus ideational *and* interactional. Norms have a prescriptive force that “exert a profound impact on how people think about state roles and obligations, and therefore on state behavior.”<sup>45</sup> But, in addition, legal norms are created, articulated and constructed through repeated interactions, through norm enunciation and interpretation and through processes of cyclicity and recursivity.<sup>46</sup> The resulting institutions, such as sovereignty and anarchy, constitute identities which then figure in interest formation.<sup>47</sup> Thus in a critical account of sovereignty, Antony Anghie argues that legal positivist norms which constructed a

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more common in research on domestic law and falls under the general heading of Law and Society; see e.g. Susan S. Silbey, *After Legal Consciousness*, 1 ANNU. REV. LAW SOC. SCI. 323 (2005).

<sup>41</sup> Alexander Wendt, *Anarchy Is What States Make of It: the Social Construction of Power Politics*, 46 INT’L ORG. 391, 394-395 (1992)

<sup>42</sup> Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 202 (1996).

<sup>43</sup> John Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 Int’l Org. 855, 856 (1998) (scholar need to acknowledge the constitutive rules to explain the origins of international relations and to rescue structure from being treated “as the reified residue left behind by long-ceased historical processes”).

<sup>44</sup> Brunnée & Toope (2010), at 13.

<sup>45</sup> Keohane (1997), at 492; Friedrich Kratochwil, *The Force of Prescriptions*, 38 INT’L ORG. 685 (1984)

<sup>46</sup> Terence C. Halliday, *Recursivity of Global Normmaking: A Sociolegal Agenda*, 5 ANNU. REV. LAW SOC. SCI. 263, 269 (2009) (recursivity in law includes the “rounds, or cycles, or turns, or feedback effects, or episodes” of legal normmaking).

<sup>47</sup> Wendt (1992); Slaughter, Tulumello & Wood (1998), at 373.

particular meaning of sovereignty enabled a colonial confrontation between states and ‘non-states’.<sup>48</sup> For those scholars who are more hopeful about the possibility of international legal practices, two questions remain. First, under what conditions are legal norms going to be effective; under what conditions will legal rules, practices and institutions have a causal impact on international actors?<sup>49</sup> The second, more relevant question for this project is whether there something particular to *legal* norms, something in the quality of *legal* that makes compliance with legal norms different or more effective?<sup>50</sup> “[D]o legal norms, as a type, operate differently from any other kinds of norms in world politics?”<sup>51</sup>

Those adhering to neo-liberal institutional IR theories tend to understand law and legal norms in a legal positivist, Hartian sense, where formal criteria such as secondary rules of recognition engender internal feelings or beliefs about being obliged.<sup>52</sup> On the other hand, scholars more interested in constructivist theories and in the link between legal legitimacy and social practice have tended to see legal norms as being inherently connected to natural justice principles and procedures (however defined).<sup>53</sup> Martha Finnemore, Stephen Toope and Jutta Brunnée in various articles and texts have explicitly linked feelings of obligation in IL to Fuller’s

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<sup>48</sup> Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L. J. 1 (1999); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW (2005)

<sup>49</sup> Slaughter, Tulumello & Wood (1998), at 380.

<sup>50</sup> Keohane (1997), at 492.

<sup>51</sup> Martha Finnemore, *Are Legal Norms Distinctive*, 32 N.Y.U. J. INT’L L. & POL. 699, 701 (1999-2000). This has lead scholars to investigate the foundations of *legal* obligation more generally. See Brunnée & Toope 2010, 6 (“the key to understanding the role that law plays in international society lies in understanding the nature and operation in practice of legal obligation.”). Norm diffusion and international law theory has understandably proceeded in step with modern legal jurisprudence which moves beyond Austinian concepts of law. Law is not (merely) sovereign commands backed by threat of force. Rather, legal norms engender a sense of obligation because of law’s legitimacy and the respect it carries. But then the question devolves into defining legitimacy. See Hurd 1999, at 381 (At its most basic, legitimacy relates to the “normative belief by an actor that a rule or institution ought to be obeyed.” This is a subjective, relational perception that shapes how the actor sees his or her interests); Keohane 1997, 491 (Legitimacy relates to criteria internal to the rule and “is related to the process by which it is created, its consistency with accepted general norms, and its perceived fairness or specificity”); and Slaughter 1997, 379 (It is the process through which law is “created, interpreted and applied” has distinctive effects on international behavior).

<sup>52</sup> H L. A. Hart, *The Concept of Law* 88 (1994).

<sup>53</sup> Finnemore & Toope (2001); Brunnée & Toope (2010).

eight desiderata outlined in *The Morality of Law*,<sup>54</sup> which are for Fuller the minimum qualities for a set of rules to be properly called a legal system.<sup>55</sup> Brunée and Toope argue that the only way that *legal* obligation can claim to be distinctive is to the extent that the criteria are internal to law.<sup>56</sup> Creating and applying law through processes which satisfy Fuller’s criteria of legality leads to a “practice of legality” that generates fidelity and obligation.<sup>57</sup> Thus the distinctiveness for Finnemore, Toope and Brunnée stems from particular legal processes that adhere to principles of fairness and natural justice. Law is about process more than about form or product: “Much of what legitimates law and distinguishes it from other forms of normativity are the processes by which it is created and applied – adherence to legal process values, the ability of actors to participate and feel their influence, and the use of legal forms of reasoning.”<sup>58</sup>

## **B. Moving away from Procedural Criteria**

These procedural approaches to legal norms raise several problems, the answers to which suggest possible shifts in the object of study. First, there is still the concern of pairing IR theories with IL. At first blush, this is a natural pairing – ‘IR’ and ‘IL’ scholars have a shared sense of the external environments they seek to explain and the problems that they are facing. They “see the same world outside their office windows” – a world of formal institutions, organizations, treaties but also a globalized world that is challenging both state sovereignty and relevance of formal state-based law.<sup>59</sup> The IR scholar’s concern about whether IL is relevant to IR has a channeling effect and leads to a natural focus on obligation in absence of state authority (it therefore makes good sense to go to analytic jurisprudence post-Austin as a source for theories about legal obligation beyond threat of force).

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<sup>54</sup> Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998); Finnemore (1999), at 705 (“Law is legitimate only to the extent that it produces rules that are generally applicable, exhibit clarity or determinacy, are coherent with other rules, are publicized (so that people know what they are), seek to avoid retroactivity, are relatively constant over time, are possible to perform, and are congruent with official action.”)

<sup>55</sup> Lon L. Fuller, *The Morality of Law*, 39 (1964).

<sup>56</sup> Brunnée & Toope (2010), at 12 (Formal criteria and institutional organizational factors do not provide an account of how *legal* obligation is analytically different from institutional structural obligation).

<sup>57</sup> Brunnée & Toope (2010), at 13.

<sup>58</sup> Finnemore & Toope (2001), at 750.

<sup>59</sup> Slaughter, Tulumello & Wood (1998), at 370.

However, a sole focus on *International* law captures only part of the activities and methods of law's global operation.<sup>60</sup> Sally Engle Merry writes that "law's internationalization" is not merely a product of IL, but rather is the result of "transnational movements such as colonialism, contemporary transnational activism, the creation of a new world order of negotiated contracts and agreements linking together diverse states, the expansion of human rights activism and institutions, and the transplanting of legal institutions themselves."<sup>61</sup> Expanding the object of study to include the transnational movement of domestic law and the plural global legal orders allows for a consideration of other effects on state power both domestically and internationally.

For example, the global rise of judicial review both in supra-national courts<sup>62</sup> and in constitutional courts resulting from constitutional reform in over eighty countries has affected a transfer of power to the judiciary and the creation of an international "juristocracy".<sup>63</sup> The movement of both public and private law legal norms (including court reforms, commercial codes, development of property systems) impacts on the institutional architecture of the state, shifting the allocation of authority between different state institutions.<sup>64</sup>

The importance of looking at transnational spaces is discussed in greater depth in the next section. Suffice it to say here that once the IR/IL pair has been decoupled, we can return to Brunnée and Toope's emphasis on reciprocity in building shared understandings and upholding practices of legality. Their interactional account provides a window into thinking about law as a

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<sup>60</sup> Berman (2009), at 232.

<sup>61</sup> Sally Engle Merry, *Anthropology and International Law*, 35 ANN. REV. ANTHROPOLOGY 99 (2006).

<sup>62</sup> As of 2006, twenty-five permanent International Courts were operational; Karen Alter, *The Multiple Roles of International Courts and Tribunals: Enforcement, Dispute Settlement, Constitutional and Administrative Review*, in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art 345* (Jeffrey L. Dunoff & Mark A. Pollack eds. 2013) (arguing that states have delegated four roles to judges – enforcement, constitutional review, administrative and dispute settlement. In their constitutional role, courts assess the legal validity of legislative and government actions).

<sup>63</sup> RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS & CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 11-12, 169-170 (2004) (adopting a realist explanation of the rise of constitutionalism and arguing that constitutionalization of rights "is evidence that the rhetoric of rights and judicial review has been appropriated by threatened elites to bolster their own position in the polity"). Ran Hirschl, *The Realist Turn in Comparative Constitutional Politics*, 62 POL. RES. Q. 825 (2009) (discussing realist and contextualist explanations of constitutional courts and judicial review); THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006); Jacco Bomhoff, *Balancing, the Global and the Local: Judicial Balancing As a Problematic Topic in Comparative (Constitutional) Law*, 31 HASTINGS INT'L & COMP. L. REV. 555 (2008)

<sup>64</sup> Shaffer (2012), 245; Halliday (2009).

social phenomenon, about ongoing and sustained practice in legal creation and adaptation, and in the way legal actors collaborate to build shared understandings in law.<sup>65</sup>

Unfortunately, an interactional and constructivist account of legal norms that relies on Fuller's criteria of legitimacy, while intuitively pleasing, is ultimately inaccurate and misleading. Fuller's principles qualify legal positivism rather than replace it.<sup>66</sup> These "more substantive considerations" only work to overturn presumptions of validity and legitimacy that are conferred by formal criteria.<sup>67</sup> More importantly, Fuller's criteria are aspirational and idealistic, whereas we know that constructivism and repeated social interaction is not always an altogether happy affair.<sup>68</sup> Constructivism as a theory posits that social interaction, communication and discourse construct preferences and shape identities. Ongoing interaction and processes of consideration and review are not necessarily linked to an *ex ante* quality of norms. In other words, legitimacy, rather than being a descriptive term, is method of appraisal undertaken *ex post*.<sup>69</sup>

The best way to understand fundamentally what law is about is to go to our experience of law, grounded in everyday life and our professional formation as legal actors. This suggests that the procedural criteria in law-making may not represent the most important aspects of our "experience of law" in shaping fidelity and compliance.<sup>70</sup> Following Sally Engle Merry's suggestion of "studying up,"<sup>71</sup> one ought to look at how fidelity is created, at knowledge practices "particular points of intersection, technologies of legality, and sites of negotiation among multiple systems of law." This approach of "studying up" fits better with a constructivist

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<sup>65</sup> Finnemore & Toope (2001), at 743 (law is a social phenomenon that is embedded in "practices, beliefs and traditions of societies, and shaped by interaction among societies").

<sup>66</sup> Nico Krisch, *Brunnee, Jutta, & Stephen J. Toope. Legitimacy and Legality in International Law: An Interactional Account*, 106 AM. J. INT'L L. 203 (2012) (Formal claims to legitimacy are conditioned by but cannot be substituted with procedural requirements). Krisch also correctly points out that Fuller was interested in the relationship between law giver and citizen, and in protecting the citizen from arbitrary and authoritative power. Where international law denotes the law between states it is not clear why these rule of law protections are needed.

<sup>67</sup> Friedrich Kratochwil, *On Legitimacy*, 20 INT'L RELATIONS 302, 305 (2006).

<sup>68</sup> See generally, *CONSTRUCTING THE INTERNATIONAL ECONOMY* (Rawi Abdelal, Mark Blyth & Craig Parsons, eds. 2010), and notwithstanding Koh's assertion that a constructivist approach "recognizes the positive transformational effects of repeated participation in the legal process." On the negative, unintended consequences of law, see *THE POLITICS OF INFORMAL JUSTICE: STUDIES ON LAW AND SOCIAL CONTROL* (Richard L. Abel ed. 1982)

<sup>69</sup> Kratochwil (2006).

<sup>70</sup> Kleinfeld (2009-2010) (to understand the nature of law and hence it's distinctiveness requires a "reconstructive approach.")

<sup>71</sup> Merry (2006), at 108.

theory interested in outcomes of social interaction. The task then is to reconstruct the beliefs and values that make up our experiences in social practices and institutions: “we may by understanding its component parts be able to get some purchase on what in practice we already take the law to be.”<sup>72</sup> For example, is there a way to investigate the creativity in and impulse to invent varieties of normative technologies<sup>73</sup> as a source for law’s distinctiveness? Rather than investigating the aspirational descriptive qualities of legal procedural fairness, do relationships movements of law and legal transfers point to distinctiveness in legal technologies, in the ways that law operates as an instrument?

### III. LAW IN PRACTICE IN THE TRANSNATIONAL MOVEMENT OF LAW

#### A. Transfer and Clashes in Transnational Legal Processes<sup>74</sup>

The conflicts and possibilities in legal transplants highlight the contingency of legal orders and “the law-creating potential of complex, interpenetrating networks of social relationships of community.”<sup>75</sup> Multiple legal products impact processes in the movement of law, transnational legal determinations about valid law, and the construction and transfer of legal meaning across geopolitical and cultural boundaries.<sup>76</sup> These areas highlight the interactional nature in the development of legal norms, and the conflict and competition<sup>77</sup> in setting agendas for articulating

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<sup>72</sup> Kleinfeld (2009-2010), at 2458.

<sup>73</sup> Halliday (2009), at 282.

<sup>74</sup> I adopt the phrase “transnational legal processes”, aware that it conjures up both recognition and confusion; see Harold Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); Oona A. Hathaway & Harold Hongju Koh, *Transnational Legal Process (“Horizontal and Vertical Legal Process”)*, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 191 (Oona A. Hathaway & Harold Hongju Koh eds. 2005). Koh used the phrase “transnational legal process” to highlight the dynamic nature of law in shaping identities and constraining behavior in international relations. Interaction creates patterns of behavior and generates norms of external conduct. Through repeated processes of interaction and internationalization law acquires its “stickiness” (at 204). Gregory Shaffer (2012) defines transnational legal process as “the process through which the transnational construction and conveyance of legal norms takes place” (at 236) and argues that processes of articulating, enforcing and internalizing law do not unfold as uni-directionally as Koh implies. Rather the process of legal change is multidirectional and diachronic.

<sup>75</sup> Cotterrell (2012), at 515.

<sup>76</sup> John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 N.Y.U. J. INT’L L. & POL. 657 (2008); Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229 (2012).

<sup>77</sup> Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1998).

legal orders in a polymorphic legal world.<sup>78</sup> They account for interactions between international and domestic laws as well as the syncretism present in current legal thinking and practice.<sup>79</sup>

My suggestion is that the construction and transnational flow of legal norms are places to look for clues about the distinctiveness of legal norms. In these transnational spaces, the concern is not the lack of a hierarchical state order to enforce legal obligations, but rather the plurality of options and the prospect of conflicting legal orders. Understanding transnational domains and the relationships between donors and recipients in the movement of law requires a similar decoupling of law from “hierarchically ordered imposition of social control emanating from a de facto sovereign.”<sup>80</sup> But unlike IL, the problem is not just how to operate in a horizontal world, but additionally the contingency expressed in coexisting legal orders with multiple legitimacies and normative claims. The interactions, collisions, “iterative interplays” and resulting modes of norm-making may have something to tell us about the distinctiveness of law.

Legal actors in transnational arenas include public and private actors, disaggregated-state officials who meet to discuss common governance functions,<sup>81</sup> international development agencies,<sup>82</sup> and professionals acting in networks, epistemic communities and in quasi legal institutions (WTO, ICSID, ISO).<sup>83</sup> Networks of domestic judges increasingly intervene in

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<sup>78</sup> Toby Goldbach, Benjamin Brake & Peter Katzenstein, *The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating*, 20 IND. J. GLOBAL LEGAL STUD. (forthcoming 2013); Koh (1996).

<sup>79</sup> Kennedy, *Three Globalizations*, *supra* note 206, at 65 (legal syncretism is evident in the “mystical union” of positive and natural law public law; policy analysis does legal work “with whatever materials are left over from the grandiose projects of the past”).

<sup>80</sup> Brunée & Toope (2010), at 10.

<sup>81</sup> Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies and Disaggregated Democracy*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 121, 129-131 (Karl-Heinz Ladeur ed., 2004); Anne Marie Slaughter, *Breaking Out: The Proliferation of Actors in the International System*, in GLOBAL PRESCRIPTIONS 12, 28 (Yves Dezalay & Bryant G. Garth, eds. 2002). For example U.S. regulatory officials serve on delegations with state officials in similar regulatory positions to negotiate transnational or international treaties. See e.g. Stewart, *supra* note 115, at 78.

<sup>82</sup> John Gillespie and Pip Nicholson, *Taking the interpretation of legal transfers seriously: the challenge for law and development*, LAW AND DEVELOPMENT AND THE GLOBAL DISCOURSES OF LEGAL TRANSFERS (John Gillespie and Pip Nicholson eds 2012).

<sup>83</sup> Haas; Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, 58 Am. J. Comp. L. 525, 551-552 (2010) (legal elites who studied and conducted research abroad that were the primary conveyors of foreign legal ideas about lay participation in the criminal trial that formed the basis for South Korea’s jury system enacted in 2008); Yves Dezalay & Bryant G. Garth, *Introduction: Lawyers, Law, and Society*, in LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION, *supra* note 5, at 1, 3 (Lawyers act as legal brokers “converting social, political

discussions about domestic legal reforms and court administration. Judges meet counterparts in other countries, with international organizations such as the Council of Europe and The World Bank to discuss everything from foundations in the rule of law, anti-corruption measures, client service and communication, to court administration management skills, records management to improving signs and installing help desks as a way to improve court accessibility for unrepresented accused, litigants and witnesses.<sup>84</sup>

For example, the National Judicial Institute in Canada, which has traditionally focused on education of local judiciary, has become increasingly involved in transnational projects in the Philippines, Ukraine, China and Ghana.<sup>85</sup> A two-year Canadian International Development Agency (CIDA) funded project called JUSTICE (Judicial Systems Improvement for Commerce and Economy) was implemented by the NJI “to promote economic development in the Caribbean, Africa, and South America by offering local judges and court authorities help in establishing more efficient, accessible, and dependable judicial systems.”

Actors often have agendas in promoting the flow of legal norms. Legal norms may also flow “less consciously” through intensified cross-border economic, professional and cultural interactions. There are thus tensions and conflicts in the movement of legal norms.

## **B. Legal Transplants**

“Legal transplants” refers to the movement and reception of a law between states.<sup>86</sup> The concept invokes the difficulties in the relationships between recipients/donors, diffusion/reception, and points to the mutually constitutive relationships between migratory and

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and economic resources into legal processes”). Scholars and academics articulate ideas that can be translated into the international arena; see e.g. Catherine Weaver, *The Meaning of Development, Constructing the World Bank’s Good Governance Agenda*, in *CONSTRUCTING THE INTERNATIONAL ECONOMY* 47 (Rawi Abdelal et al. eds., 2010) and Alvaro Santos, *The World Bank’s Uses of the “Rule of Law” Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 253 (David M. Trubek & Alvaro Santos eds., 2006), for a discussion of the infusion of “good governance” norms into discourse at the World Bank.

<sup>84</sup> About Us, The International Organization for Judicial Training, <http://www.iojt.org/index.html>.

<sup>85</sup> Ghana-Canada Judicial Cooperation Project with support from the Federal Judicial Affairs (FJA) and National Judicial Institute (NJI) facilitated judges from Ghana travelling to Canada on a Court Managers Training Programme.

<sup>86</sup> See Alan Watson, *Legal Transplants and Law Reform*, 92 L. Q. REV. 79 (1976); Ewald, at 491; William Twining, *Social Science and Diffusion of Law*, 32 J.L. & SOC’Y 203, 211-13 (2005).



local law.<sup>87</sup> The process of transplanting law emphasizes domestic differences, and studies have investigated reasons for acceptance and resistance in the movement of law, including differences in the types of legal transfers sometimes referred to as “organic” versus “mechanical”,<sup>88</sup> and legal families’ or legal origin theories.<sup>89</sup> Some of these studies have been critiqued for not accounting for “transplant effects” and subsequent institutional changes, for example in colonial territories.<sup>90</sup> The point to highlight here is that legal transplants must overcome obstacles in a new legal system and will be affected by processes for exporting and importing legal systems, the characteristics that inhere in the transplanted law itself, and the ability to graft onto existing legal norms and practices.<sup>91</sup>

The relationships between donor and recipients suggest recurring themes in transnational law and legal movements. In particular, legal transplants highlight the places of competition, power and politics in the relationships between legal donors and legal recipients. Yves Dezalay

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<sup>87</sup> Ralf Michaels, *Comparative Law by Numbers? Legal Origins Thesis, Doing Business Reports, and the Silence of Traditional Comparative Law*, 57 AM. J. COMP. L. 765, 781 (2009); John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 N.Y.U. J. INT'L L. & POL. 657, 685 (2008); and Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165 (2003).

<sup>88</sup> Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Mod. L. Rev. 1, 5-7 (1974).

<sup>89</sup> Rafael La Porta, Florencio Lopez de Silanes, Andrei Shleifer and Robert W. Vishny (LLSV) in a series of papers examined the correlation between civil and common-law origins and observable phenomena such as financial development, formalism of judicial procedures, and judicial independence. In their study of 49 countries LLSV found that civil-law countries, in particular countries that were receivers of French civil-law, had weaker investor protections and has less developed capital markets as compared to common law countries; see e.g. Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, *Legal Determinants of External Finance*, 52 J. Fin. 1131, 1149 (1997); Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *Courts*, 118 Q. J. ECON. 453 (2003); Rafael La Porta, Florencio Lopez-de-Silanes, Christian Pop-Eleches & Andrei Shleifer, *Judicial Checks and Balances*, 112 J. POL. ECON. 445 (2004). For a review of country studies and the legal origin effects on particular areas of law, see generally La Porta, *supra* note 7, at 292-93. See also Mirjan Damaška, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839 (1997) (examining two families of civil procedure); Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813 (2009) (examining corporate and securities laws empirically to find diffusion of materials from core countries to periphery countries).

<sup>90</sup> Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 Eur. Econ. Rev. 165, 166 (2003); Daniels, Trebilcock & Carson (2011), at 126; Curtis J. Milhaupt, *Beyond Legal Origin: Rethinking Law's Relationship to the Economy-Implications for Policy*, 57 AM. J. COMP. L. 831 (2009).

<sup>91</sup> Pierre Legrand, *The Impossibility of 'Legal Transplants'*, 4 Maastricht J. Eur. & Comp. L. 111 (1997); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* 134-78 (2006); Berkowitz, Pistor, & Richard, at 167.

and Bryant Garth have been involved in multiple research projects looking into “competitive processes” implicated in the movement of law, in particular in “creating and maintaining a demand for transnational norms.”<sup>92</sup> They find that Judges, multinational firms, and business litigators have worked to promote a U.S. style litigation approach as the standard for international commercial arbitration.<sup>93</sup> Similarly, Halliday notes the politics and power shifts between the market and the state even in highly technical regulatory reforms such as corporate bankruptcy law reform.<sup>94</sup> Countries in the “Global South” received national corporate bankruptcy transplants induced by persuasion, material benefits and on occasion “economic coercion”. International financial institutions (IFIs) use financial bailouts to induce states to accept legal transplants that included legal regimes for market regulation and increased functions for courts in managing reorganization and liquidation, for example through the establishment of a new Commercial Court in Indonesia. These reforms exceed technical reforms and achieve a “restructuring of the state itself” through injection of courts and reshuffling functions and power among state institutions.

The influence of the United States as a donor of legal forms and procedures has been examined in a pair of articles by Peter Katzenstein and Benjamin Brake. The first examines the spread of private law procedures, specifically class action and discovery procedures.<sup>95</sup> In the second article, Goldbach, Brake and Katzenstein evaluate the movement of U.S. public law,

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<sup>92</sup> Yves Dezalay & Bryant G. Garth, *Marketing and Selling Transnational ‘Judges’ and Global ‘Experts’: Building the Credibility of (Quasi) Judicial Regulation*, 8 SOCIO-ECON. REV. 113, 114 (2010); YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* (2002); Yves Dezalay & Bryant G. Garth, *Marketing and legitimating two sides of transnational justice : possible trajectories toward a unified transnational field* in *LAWYERS AND THE CONSTRUCTION OF TRANSNATIONAL JUSTICE* (Yves Dezalay & Bryant G. Garth eds., 2012).

<sup>93</sup> Yves Dezalay & Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (1998).

<sup>94</sup> Terence C. Halliday, *Architects of the State: International Financial Institutions and the Reconstruction of States in East Asia*, 37 *Law and Soc. Inq.* 265 (2012)

<sup>95</sup> Benjamin Brake & Peter J. Katzenstein, *Lost in Translation? Non-State Actors and the Transnational Movement of Procedural Law*, 67 *Int’l Org.* 4 (forthcoming October 2013) (while the movement of U.S. law has reshaped legal theory, pedagogy, procedure, and organizing structures of the legal profession, nevertheless, “Americanization” must still compete with other forces, including Europeanization, Islamicization, Sinicization, Indianization or Japanization).

specifically criminal and administrative legal procedures.<sup>96</sup> Legal transplants of U.S. legal procedures stand as an example of both U.S. power to export legal models, but also the competition the U.S. faces in competing with other models and in on the ground translation.<sup>97</sup> The movement of law across borders is situated in a world of material, social and intellectual power which affects states' ability to shape discourse about legal norms and make certain legal norms available for transplant. However, legal transplants also point to choice of form, and processes of translation, resistance and modification. Legal ideologies influence processes of transplanting laws and often shape donor decisions on how to frame or package legal transplants. The result of the movement of legal norms is often syncretic and polymorphic.

### C. Choice and the “Compliance-Pull” of Reform

The transnational movement of U.S. style jury systems, in particular, is significant for what legal transplants have to tell us about the distinctiveness of legal norms.<sup>98</sup> Lay participation in the criminal trial has seen a “rebirth”. Legal transplants of jury systems to post-authoritarian countries has been channeled through socialization of foreign legal scholars from at U.S. law schools,<sup>99</sup> as well as at conferences,<sup>100</sup> or through collaborative research networks. At least fifty-

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<sup>96</sup> Toby Goldbach, Benjamin Brake and Peter Katzenstein, *The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating*, 20 IND. J. GLOBAL LEGAL STUD. (forthcoming 2013).

<sup>97</sup> For example, U.S. influence in the movement of constitutional norms has been minimal. In particular, in periods of constitutional reforms most states adopt parliamentary systems and specialized constitutional courts in contrast to the U.S. model of presidentialism and judicial review. Similarly, German public law, which emphasizes appropriateness or proportionality of substantive outcomes, often serves as an example for public law systems; see e.g. Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?* 107 HARV. L. REV. 1279 (1994) (Comparing U.S. administrative law system which focuses on oversight of executive processes, to German public law system which focuses on proportionality and the protection of individual rights against the state); and Malcolm Russell-Einhorn, Jeffrey Lubbers & Vedat Milor, *Strengthening Access to Information and Public Participation in Transition Countries—Latvia As a Case Study in Administrative Law Reform*, 54 ADMIN. L. REV. 459, 483 (2002) (the German Administrative Procedure Act of 1976 served as the example for reforms to public law in Latvia in 2001)

<sup>98</sup> Nancy S. Marder, *An Introduction to Comparative Jury Systems*, 86 CHI.-KENT L. REV. 453, 454 (2011) (noting that “the Law & Society Association (LSA), and in particular its Lay Participation in Legal Systems Collaborative Research Network (CRN) and Lay Participation in Law International Research Collaborative (IRC)” facilitates the transnational movement of scholarship between the U.S. and foreign jury scholars).

<sup>99</sup> Richard O. Lempert, *The Internationalization of Lay Decision-Making: Jury Resurgence and Jury Research*, 40 CORNELL INT’L L.J. 477, 480 (2007) (noting the spread of juries to the post-authoritarian countries of Japan, Korea, Russia, Spain, and South Africa).

four countries use jury trials, including Russia and Spain, which recently reintroduced jury trials.<sup>101</sup> Several post-Soviet countries, including Armenia, Kazakhstan, Ukraine and Azerbaijan enshrined a right to trial by jury in their constitutions.<sup>102</sup> Georgia, which enacted legislation enabling jury trials in 2009, modeled its jury system on U.S. juries and held its first criminal jury trial in 2011.<sup>103</sup>

Court reforms of East Asian legal systems in the last decade exemplify the presence and limits of power politics, but also highlight the latitude some recipients have in choosing from various legal models. These point to the possibility that legal actors build fidelity and feelings of obligation other than through adherence to procedural quality criteria. East Asian transplants of jury and lay participation systems have been subjected to processes of showcasing, selection, and translation. The resulting systems are syncretic and polymorphic, yet they receive a wide range of support from both legal elites and members of the public.

Japan engaged in a process of investigating various models before instituting the *Saiban-in Seido*.<sup>104</sup> A sub-committee of the Osaka Bar Association's Committee for Judicial System Reform toured the United States, Great Britain, and Germany, and several judges of the Supreme

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<sup>100</sup> See Valerie P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT'L L.J. 303, 309-313 (2007) (discussing the role of the Clark Business Law Institute at Cornell Law School in bringing together scholars studying lay participation in Japan, Korea, China, and Thailand).

<sup>101</sup> Toby Goldbach & Valerie P. Hans, *Juries, Lay Judges and Trials*, in ENCYCLOPEDIA ON CRIMINOLOGY AND CRIMINAL JUSTICE (David Weisbrud & Gerben Bruinsma eds., forthcoming 2013); S C Thaman, *Should criminal juries give reasons for their verdicts?: The Spanish experience and the implications of the European Court of Human Rights decision in Taxquet v Belgium*, 86 CHI.-KENT L. REV. 613 (2011); Neil Vidmar, *A Historical and Comparative Perspective On the Common Law Jury*, in WORLD JURY SYSTEMS 1 (Neil Vidmar ed., 2000). Other countries, while not adopting the independent jury model, have altered their trial processes away from dossier-based inquisitorial approaches toward more adversarial oral evidence presentation to facilitate eventual citizen participation.

<sup>102</sup> Nikolai Kovalev, *Criminal justice reform in Russia, Ukraine, and the Former Republics of the Soviet Union* (2010).

<sup>103</sup> Peter Roudik, *Georgia: Courts with Jurors Established Nationwide*, LIBR. OF CONG. GLOBAL LEGAL MONITOR (Nov. 9, 2011), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205402877\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205402877_text). Georgia contracted the U.S. Center for Jury Studies at the National Center for State Courts to draft a jury management plan, including recommendations regarding procedures for summoning jurors, training court personnel, and orienting individuals to trial by jury.

<sup>104</sup> Z. Corey & V P Hans, *Japan's new lay judge system: Deliberative democracy in action?* 12 ASIAN-PAC. L. & POL'Y J. 72 (2010); Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-colonial Strategies and Deliberative Participatory Democracy*, 86 Chi.-Kent L. Rev. 789 (2011).

Court of Japan travelled to the United States, the United Kingdom, Germany and France investigating potential lay participation transplants.<sup>105</sup> Japan had a jury system from 1928 to 1943. And while Japan moved from a dossier-based trial to oral presentations in the recent reforms, the resulting system includes more features reflective of a mixed judge/lay person<sup>106</sup> model familiar to civil law jurisdictions.<sup>107</sup> In serious criminal cases, six lay judges and three professional judges decide questions of guilt and sentencing in criminal felony cases based on a majority vote by the panel, where at least one citizen and one professional is in the majority.<sup>108</sup>

South Korea, often receptive to ideas and practices stemming from the United States,<sup>109</sup> transplanted a version of U.S. jury system, translating features from both U.S. and German lay participation models. Korean jurors deliberate separately from the judge, and prosecution and defense have a limited number (five) of peremptory challenges but an unlimited number of challenges for cause. In addition, South Korea incorporated California's rules on juror note-taking and questioning witnesses.<sup>110</sup> The system differs, however, from the U.S. jury system in the following respects: juries are composed of five, seven, or nine jurors in proportion to the seriousness of a crime; where jurors cannot reach a unanimous decision on the verdict, they can consult the presiding judge and then suggest a verdict based on a majority vote; and finally, the jury is advisory, present recommendations which the judge can accept or reject.<sup>111</sup>

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<sup>105</sup> Richard Lempert, *A Jury for Japan?*, 40 AM. J. COMP. L. 37, 38-39 (1992) (discussing the feasibility of an Anglo-American jury system or the Continental mixed lay/professional bench for the Japanese legal system).

<sup>106</sup> Mixed tribunals were themselves a product of translation. Initially, the English jury system was transplanted to countries like France and Germany but the form of lay participation was translated to fit with local inquisitorial criminal procedure. *See* Kahn-Freund, at 17-18.

<sup>107</sup> Japan also modeled its new Commercial Code on the German counterpart. Generally the German legal tradition influenced several European and East-Asian countries, *see* Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 290 (2008)

<sup>108</sup> Fukurai (2011), at 801, 806 (discussing Japan's passage of the Quasi-Jury Act in 2004 and its move toward a mixed judge/layperson model). Fukurai notes that a mixed lay/judge panel conducted the first-ever trial of a U.S. military serviceman in Okinawa.

<sup>109</sup> Jae-Hyup Lee, *Getting Citizens Involved: Civil Participation in Judicial Decision-Making in Korea*, 4 East Asia L. Rev. 177, 179 (2009).

<sup>110</sup> Ryan Park (2010)

<sup>111</sup> Sangjoon Kim, Jaihyun Park, Kwangbai Park, and Jin-Sup Eom, *Judge-Jury Agreement in Criminal Cases: The First Three Years of the Korean Jury System*, 10 (1), J. EMPIRICAL LEGAL STUD. 35 (2013) (noting that Koreans are skeptical about jury competence but finding that judges and juries agreed on verdicts 91 % of the time).

In a surprising, recent development in support of the shadow jury system, the Supreme Court of South Korea ruled in two decisions that, where a criminal case is tried by a jury and the jury returns a unanimous verdict of not-guilty, an appellate court cannot reverse a lower court judge's not-guilty verdict unless there is clear and convincing reason following a new investigation of the evidence.<sup>112</sup> This increase status and influence of the new jury transplant supports Korea's aspirational goals of citizen participation in decision making, and points to normative conceptual goals of the legal transplants. However, there's also a sociological story, about processes of investigating and implementing transplants that might be relevant to understanding compliance pull.

Plans for the introduction of a jury system were discussed in 1999 under the auspicious of the Judicial Reform Steering Committee, organized by the Supreme Court of Korea. On October 28, 2003 a Judicial Reform Committee [*Sabeopgaehyeok wiwonhoe*] was created and on December 15, 2004, the Presidential Committee on Judicial Reform [*Sabeopjedogaehyeok chujinwiwonhoe*] was established to implement the recommendations. A plan for civil participation was drafted in 2005, discussed by the National assembly in 2006, and an Act was passed the following year. The Supreme Court also established a "Judicial Participation Planning Board" to conduct mock jury trials, videotape and analyze real jury trials, and run educational sessions for the legal practitioners.

Existing research about compliance can be expanded by examining the process of participating in legal reform and justice projects, as well as the allure or aesthetics of interacting with law as an instrument.<sup>113</sup> In other words, research might examine whether a connection to law's promise of reform and development may also contribute to compliance and feelings of fidelity. For example, Annelise Riles finds that human rights lawyers remain engaged and embedded in their projects despite strong and widespread skepticism about the human rights regime's ability to deliver.<sup>114</sup> Similarly, despite declarations that the law and development

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<sup>112</sup> Kim et al (2013), at 52.

<sup>113</sup> Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047 (2002); Bruno Latour, *Morality and Technology: the End of the Means*, 19 THEORY CULTURE & SOC'Y 247 (2002); Annelise Riles, *Property As Legal Knowledge: Means and Ends*, 10 J. ROYAL ANTHROPOLOGICAL INST. 775 (2004)

<sup>114</sup> Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 AM. ANTHRO. 52 (2006).

project of the 1980s was a failure,<sup>115</sup> law and development and rule of law programs persist and are now entering their ‘third’ incarnation.<sup>116</sup>

Studies report positive associations following participation in legal institutions, highlighting the connection between interaction and feelings of fidelity. For example jurors report higher regard for courts, judges and the jury system following their trial experiences (Diamond, 1993). In a U.S. national survey of over 8,000 former jurors, sixty-three percent reported that they were more favorable about jury duty after serving. More than eighty-five percent of Croatian lay judges had positive opinions about their participation. Moreover, lay judges believe they have a substantial and beneficial impact on verdicts,<sup>117</sup> despite studies which show that, even with formal voting requirements, lay judges agree with and are likely to modify their opinion to resolve disagreements with professional judges (Kutnjak Ivković, 2007). Surveys of jurors in South Korea’s new advisory jury system show similar positive views of their experience (Park, 2010), and in a study of Japanese citizen participation, ninety-four percent of the lay judge respondents reported having a positive experience. Research design may be more complicated in international settings, nevertheless these studies point to interesting ways to think about the influence of *legal* participation.

#### IV. GLOBAL LEGAL PLURALISM AND INDETERMINATE LEGAL ORDERS

##### A. Power and Politics

Dispute processing and social regulation occur in multiple locations, in institutions and organizations that draw on the symbols of law.<sup>118</sup> Both formal and informal methods are being

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<sup>115</sup> David Trubek & Mark Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 WISC. L. REV. 1062 (1974)

<sup>116</sup> David Trubek and Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek and Alvaro Santos, eds. 2006)

<sup>117</sup> A study of German lay judges indicates that most respondents felt that the court would have decided differently “in a few cases” and only 20 percent responded that the court’s decision would have been the same without the participation of lay judges.

<sup>118</sup> Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC’Y REV. 869, 874 (1988).

used to transnationally regulate the environment, security, health, immigration, and labor.<sup>119</sup> Private and public<sup>120</sup> actors govern through a variety of mechanisms that include domestic administrative agencies and regimes structured by treaties or similar types of agreements.<sup>121</sup> Multiple overlapping jurisdictions subsist in laws, treaties, or other legal structures that coordinate and facilitate cross border activity, and in judicial decisions that extend the territorial application of regulations.<sup>122</sup> And several international organizations and transnational institutions intercede into state oversight through judicial review jurisdictions.<sup>123</sup>

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<sup>119</sup> Robert A. Kagan, *Globalization and Legal Change: The ‘Americanization’ of European Law?* 1 REG. & GOVERNANCE 99, 100 (2007); Saskia Sassen, *De-Nationalized State Agendas and Privatized Norm-Making*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION, 51, 52–53 (Karl-Heinz Ladeur ed., 2004). Examples of global regulatory activity include UN Security Council regulation of movement of arms, food and money in countries that are subject to sanctions; Security Council listing of individuals whose assets will be frozen under anti-terrorism rules.

<sup>120</sup> Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of “Private” and “Public” Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEGAL STUD. 617, 633 (2011). See generally Riles, *Collateral Knowledge* (showing the similarity in how participants in public and private institutions conceive of their regulatory activities).

<sup>121</sup> GAL scholars identify five types of global administration – administration by formal IOs, collective action by transnational networks, distributed administration by national regulators, by hybrid intergovernmental-private arrangements, and by private institutions with regulatory functions. See Benedict Kingsbury, Nico Krisch, Richard B. Stewart & Jonathan B. Wiener, *Foreword: Global Governance as Administration – National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 1, 20-21 (2005); Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 69 (2005) (finding three types of international regulatory regimes); Aman, *supra* note 113, at 2111-16 (discussing “Global Regulatory Discourse”).

<sup>122</sup> Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 75-77 (2005).

<sup>123</sup> Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15, 32 (2005). Robert A. Kagan, *Globalization and Legal Change: The ‘Americanization’ of European Law?* 1 REG. & GOVERNANCE 99, 106-107 (2007). In the case of the ECJ specifically, judicial review of EU action is based on the same concept of legality as the French Conseil d’Etat. The grounds for reviewing EU action are based on the same “state-oriented organizing concept” as French review of administrative actions; there are four legality grounds listed in the E.C. Treaty: “lack of competence, infringement of an essential procedural requirement, infringement of [the] Treaty or of any rule relating to its application, or misuse of powers.” MITCHEL DE S.-O.-L’E. LASSER, *JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE* 229, 235 (2009). Review of state action has effectively been written into the North American Free Trade Agreement (NAFTA) under sections 1116 and 1117, which allow investors to bring claims for breach of substantive obligations. Thus, a developer of a hazardous waste station was able to seek review by a NAFTA tribunal of a Mexican provincial government decision to issue an Ecological Decree for the protection of a rare cactus; *Metalclad Corp. v. Mexico*, 40 I.L.M. 36 (2001); upheld *Mexico v. Metalclad Corp.*, 2001 B.C.S.C. 664 (2001). On the other hand, judicial review of arbitration awards under NAFTA may be limited depending on which arbitration rules apply to the investor’s claim; see e.g. Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of*



International and transnational communities create and give meaning to legal norms through law's "jurisgenerative power", which allows for norm articulation in "multiple overlapping jurisdictional assertions."<sup>124</sup> The collisions<sup>125</sup> (Teubner), tensions and conflicts that multiple legal orders and jurisdictional redundancies present suggest another important feature of legal norms. The possibility of multiple as well as indeterminate legal orders, the relationships between overlapping jurisdictional claims, and practices of constituting and recognizing legal orders point to particular ways that law ensures fidelity.

Overlapping jurisdictions and indeterminate orders facilitate a particular kind of stability and creative possibility. Berman refers to "dialectical dances" noting that "dialectical and iterative interplays" will happen more often "as a variety of communities claim an interest in regulating distant behavior having extraterritorial effects or as parties claim a community affiliation beyond the local."<sup>126</sup> Research into legal norms distinctiveness should examine the ways that the *contests* over legal norms create legitimacy over time. A brief survey of legal pluralist orders suggests that *recognition* not as a rule but as a practice features in the construction and stability of legal norms.

Legal pluralism was initially tied to an anthropological interest in 'traditional' or 'informal' methods of social control and investigated parallel autonomous legal orders often in colonial or post-colonial jurisdictions. Following on critiques of the way anthropology exoticized and othered its research subjects, scholarship about legal pluralism delved into uncovering the ways that colonial administrators constructed 'traditional' legal systems as a method of ordering and regulating indigenous populations.<sup>127</sup> Scholars uncovered the ways that elites codified and reified

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*Global Administrative Law*, 17 EUR. J. INT'L L. 121, 134 (2006); see also MARTIN M. SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 338-39 (2002) (noting that there is little judicial review of arbitration awards in the United States and that support of foreign arbitrators has hardly wavered).

<sup>124</sup> Berman (2009), at 235.

<sup>125</sup> Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, 61 MOD. L. REV. 11 (1998)

<sup>126</sup> Berman (2009), at 236.

<sup>127</sup> Martin Chanock, *The Law Market: the Legal Encounter in British East and Central Africa*, in *European Expansion and Law: the Encounter of European and Indigenous Law in 19th and 20th Century Africa and Asian* 279 (W.J. Mommsen & J.A. de Moor eds., 1992); Martin Chanock, *The Making of South African Legal Culture, 1902-36: Fear, Favour, and Prejudice* 248, 252 (2001); Laura Nader, *Harmony Ideology: Justice and Control in a Zapotec Mountain Village* 10, 307 (1990); Francis G. Snyder, *Colonialism and Legal Form: The Creation of Customary Law*

‘traditional’ indigenous practices for administrative or control purposes. “The creation of colonial law was neither an innocuous nor a nonviolent act: For the colonizers, it created an order that was categorically similar and thus could be subjected to their own law; for the elites among the colonized, it opened up avenues toward reaffirming their own power.”<sup>128</sup>

In addition to highlighting ways that power was implicated in both legal and scholarly projects, legal pluralism became wrapped up in debates about cultural relativism versus the quest for a universal normative international legal order.<sup>129</sup> Legal pluralism in this context represented tolerance and acceptance, but it also advanced a poignant challenge to the legal order’s stability by bringing into clear view law’s contingency.

Scholarship into legal pluralism has shifted from studying informal disputing to examine the ordering or regulation in non-state situations.<sup>130</sup> Scholars focus on the interconnectedness of social orders and the way that state law penetrates and restructures other normative orders. Legal pluralism focuses on “conceptualizing a more complex and interactive relationship between official and unofficial forms of ordering” to see the ‘unofficial’ forms as part of a plural legal order.”<sup>131</sup> Law is no longer the “exclusive artifact” of the nation state, but rather is produced by a diverse set of groups and communities that operate globally to structure and regulate behavior. Various sectors of society, including multinational enterprises, labor, human rights and the internet, are “breaking the narrow frame of national law” and developing a global law in isolation from the state.<sup>132</sup>

Legal pluralism’s second wave finds connections with narratives about globalization, transnational private regulation and non-state governance. Most recently, Sally Merry joined

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*in Senegal*, 19 J. Legal Pluralism 49, 60 (1981). Several scholars argue that local traditional or customary dispute resolution procedures were a product of converging interests of local elites and European colonial officials, see e.g. Peter Fitzpatrick, *Traditionalism and Traditional Law*, 28 J. AFR. L. 20, 23 (1984); Sally E. Merry, *Law and Colonialism*, 25 LAW & SOC’Y REV. 889, 893 (1991); Francis Snyder, *Customary Law and the Economy*, 28 J. AFR. L. 34, 35-36 (1984); Tom W. Bennett, *Comparative law and African customary law*, in OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 1, 641 at 665; Nader, *supra* note 48, at 2, 5-6.

<sup>128</sup> Michaels (2009), at 254-55.

<sup>129</sup> David Kennedy, One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream, 31 N.Y.U. REV. L. & SOC. CHANGE 641, 651 (2007)

<sup>130</sup> Richard Abel, *Law and Society: Project and Practice*, 6 ANNU. REV. LAW SOC. SCI. 1 (2010).

<sup>131</sup> Annelise Riles, “Cultural Conflicts,” 71 Law & Contemp. Prob. (2008) 273, 294.

<sup>132</sup> Gunther Teubner, Breaking Frames: the Golden Interplay of Legal and Social System, 45 AM. J. COMP. L. 149, 157 (1997)

Benedict Kingsbury – who is deeply involved in the Global Administrative Law (GAL) project – and others at NYU on a project examining the use of “indicators” as a technique of global governance.<sup>133</sup> The research agenda melds together issues in legal pluralism, international political economy and techniques of control. As legal pluralism enters into the neoliberal arena, there is now a growing sense that ‘legal’ and ‘non-legal’ forms of social regulation “have always been part of the central make-up of legal theory.”<sup>134</sup> A plurality of legal orders and a place for non-state norms is now ‘common sense’. Legal pluralism “is no more a reality than legal centralism, but rather is merely another (though potentially superior) representation of legal reality.”<sup>135</sup>

In addition to examples of multiple overlapping jurisdictions, law offers several examples of stable yet indeterminate legal regimes. The international human rights regime does not indicate whether legal procedures by which defendants are to be tried ought to resemble common-law, civil-law or mixed procedures.<sup>136</sup> For example, the various human rights treaties make no guarantees for the right to a trial by jury, nor do they establish firm guidelines concerning the admissibility of evidence or the role of the adjudicator. The final agreement on the Rules of Procedure and Evidence for the International Criminal Court (ICC) grants individual adjudicators a considerable amount of discretion in choosing applicable procedures. In order to secure support of the maximum number of member states, the final agreement avoids choosing a particular tradition. Similarly, the Latvian public law reforms, rather than imposing a uniform procedure, provided guidelines for agency decisions and allowed each agency to adopt procedures as it sees fit.<sup>137</sup>

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<sup>133</sup> The culmination of this work was recently published in Kevin Davis, Angelina Fisher, Benedict Kingsbury, and Sally Engle Merry (eds) *Governance by Indicators: Global Power through Classification and Rankings* (2012); and *see generally* Kevin E Davis, Benedict Kingsbury & Sally Engle Merry, *Indicators As a Technology of Global Governance*, 46 *Law & Soc. Rev.* 71 (2012). The World Bank supervises the collection of standards in matters from insurance markets to environmental assessments. For references that include standards and other non-binding but forceful governing mechanisms, see Peer Zumbansen, *Transnational Law*, in Elgar Encyclopedia of Comparative Law 738, 742 (Jan Smits ed., 2006)

<sup>134</sup> Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, OSGOODE CLPE RESEARCH PAPER NO. 45/2012 (December 4, 2012).

<sup>135</sup> Ralf Michaels, *Global Legal Pluralism*. 5 *ANN. REV. LAW & SOC. SCI.* 243, 256 (2009).

<sup>136</sup> Goldbach, Brake, & Katzenstein (2013).

<sup>137</sup> Russell-Einhorn, Lubbers & Milor, at 483.

## B. Recognition as Mode of Norm-Making

Current approaches to understanding legal pluralism move beyond the dichotomy between monist and pluralist concepts of law to emphasize that law is uniform *and* plural at the same time (Michaels). In his discussion of a potential third paradigm for global legal pluralism, Ralf Michaels interestingly proposes that law has this propensity toward order and coherence even in the face of the blatant contingency that legal pluralism presents. Borrowing from systems theory about recursivity and stability, Michaels argues that legal pluralism's new direction would inquire into the ways that multiple orders create stability and mutual reinforcement:

Legal pluralism suggests a third dimension – how legal systems create, through recognition, other legal systems, and how the mutual recognition among legal systems in turn creates stability (or the illusion of it). Legal pluralism allows for a relativism of position. This is not the simple normative relativism (the recognition that norms may differ and the call for tolerance)... Instead, it is an epistemic relativism in which law is constructed – not only by communities for themselves, but especially by legal systems for each other.<sup>138</sup>

Michaels advocates adopting the concept of recognition as “a practice of the recognizing law” rather than understanding it as a rule or formal criterion for validity. “Recognition, as a juridical category, is thus analyzed as a practice, an anthropological category...” Similarly, David Kennedy suggests using legal pluralism as a method to uncover the gaps and biases, and the effects of “the rule of experts” and “their routine work” which denies them “the experience of discretion and responsibility and the rest of us the opportunity to challenge their action.”<sup>139</sup>

Shifting the focus to recognition as a practice opens up spaces to bring legal pluralism back to the ‘legal centre’, back to the state and courts, not as instantiation of a monist legal order, but rather as a site for investigating multiple practices. A focus on recognition also allows for an examination of the ways that domestic state courts now exhibit core themes of legal pluralism – the “irreducible plurality of legal orders in the world, the coexistence of domestic state law with

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<sup>138</sup> Michaels (2009), at 256.

<sup>139</sup> Kennedy, *supra* note 24, at 652 (“Juxtaposing different professional sensibilities makes visible the limits, biases and blind spots of each... [and] sensitizes us to the ways in which our professional work responds more to our peculiar deformations professionals that to the world’s most pressing problems.” (*emphasis in the original*))

other legal orders, the absence of a hierarchically superior position transcending the differences.”<sup>140</sup>

Recognition as practice allows for an exploration into the boundaries of *law* by investigating interactions between and effects of multiple legal orders in addition to proving that multiple orders exist. Overlapping jurisdictional claims and indeterminate legal orders in global regulation suggest another important feature of legal norm-making. In these competitive and contingent legal spaces, legal actors and legal orders in a sense collaborate to mutually recognize and stabilize multiple coexisting legal systems.

## V. CONCLUSION: LEGAL DISTINCTIVENESS?

The paper proposes that transnational legal processes and their modes of collaborative norm-making may be additional sites to learn about the ways that law achieves its ‘stickiness.’ The relationships between donors and recipients of legal transplants suggest that in competitive and power infused legal spaces, syncretism and practices of translation are ways that legal actors collaborate to integrate legal norms. The persistence of indeterminate legal orders and the interactions between overlapping jurisdictional claims indicates that recognition as a practice may be another mode of collaborative norm-making which stabilizes legal norms.

But what does this have to tell us about the *distinctiveness* of legal norms?<sup>141</sup> Following on Merry’s suggestion to “study up”, the paper concludes with some preliminary thoughts on knowledge practices in law and what the modes of collaborative norm-making in transnational legal processes have tell us about law’s distinctiveness.

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<sup>140</sup> Michaels, *supra* note 44, at 244.

<sup>141</sup> Brunée and Toope ultimately conclude that in order to understand how law operates to shape behavior, there needs to be an investigation into particular legal qualities: “it is not enough to examine, as legal process scholars tend to do, ‘the social mechanisms that help make international law matter’ (Koh 2005: 977). Some of the potential of a constructivist approach to international law is lost unless we pay attention to both legal process and norm properties.” Brunée & Toope (2012); Finnemore & Toope (2001), at 747. The premise that there is something distinctive in the quality of legal norms has not gone uncontested. Berman (2009) writes that norm compliance “frequently reflects sociopolitical reality more than the status of those norms as law” (at 237). Instead of pursuing answers to extended debates about what constitutes law, Berman advocates taking a non-essentialist position and instead focusing on the “sets of relations between legal orders in particular historical contexts.”

## A. Attachment to Instrumentalism

Rudolf von Jhering remarked that transplanting legal institutions is a matter “of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, [and] only a fool would refuse quinine just because it didn’t grow in his back garden.”<sup>142</sup> The first knowledge practice to consider is the attraction or fascination – among academics and legal practitioners – with law reform, legal change and legal instrumentalism. The fascination with law reform presents not merely in changing law that reflects changing circumstances (e.g. climate change) or changing attitudes (e.g. same-sex marriage), but also in the new legal ways that we posit to solve (old) problems. Despite the “failure” of the welfare state, the failure of law and development, the critique of judges and the courts, legal actors maintain a vision of law “as a set of problem-solving institutions and of legal techniques”. To think like a lawyer, writes Riles, “is to think of law as a tool or a means to an end, whether one imagines law as a tool of social justice or a tool of corporate interests.”<sup>143</sup>

Instrumentalism in legal transplants is solidly entrenched in a broader history of legal thinking, particularly in the United States, which has come to see law as a tool.<sup>144</sup> Law is a “social instrument,” where the social reality is malleable and can be altered “by humans for human purposes in the course of solving problems.”<sup>145</sup> It is a technology that lawmakers – as social engineers – employ to achieve external sociological goals. Law is a means to serve social ends even if different people disagree about the “right goals” to pursue or the “right ways” to pursue them.

With respect to IL, Kleinfeld writes that law acts as a bridge between the hypothetical and the actual, it “stands in a special relationship to consequences in the world” in a way that most forms of discourse do not. Law has real world consequences, “bringing them to pass in virtue of imperatives suffused with a certain sort of power.” Does this sense of obligation and

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<sup>142</sup> Quoted in Zweigert & Kötz (1998), at 13. This is not to suggest that transplants are always useful or that recipients are not coerced or motivated by prestige or reputational considerations. Rather, the suggestion is that legal transplants are heavily embedded in instrumental thinking and the view that imported legal institutions have a role to play in addressing socio-economic or political goals.

<sup>143</sup> Riles (2006), at 59.

<sup>144</sup> Summers (1982), at 60; Jhering 1913; Tamanaha 2001.

<sup>145</sup> Summers (1982), at 31.

commitment to problem solving, the creativity in and impulse to invent varieties of normative technologies<sup>146</sup> stand as a source for law's distinctiveness?

## **B. Contingency and Expectations**

A second way to think about knowledge practices in law is to examine the curious way that legal norms are able to function in indeterminate and multiple legal orders. Both Michaels and Berman suggest that multiple jurisdictional claims generate greater possibilities for creativity *and* stability in legal norm-making. For their thinking about global legal pluralism, Michaels and Gunther Teubner clearly borrow from sociological systems theory.<sup>147</sup> I conclude with a closer look at those claims and what they add to thinking about legal norms' distinctiveness.

Niklas Luhmann engaged in several sociological accounts of systems theory in law.<sup>148</sup> In *A Sociological Theory of Law*, Luhmann investigates the particular ways that legal norms manage and coordinate expectations.<sup>149</sup> He argues that the distinction scholars make between the normative and the factual should be replaced with a distinction between normative and cognitive expectations and their place in the handling of disappointment. Cognitive expectations are those that can be changed in the face of contradicting information, whereas we do not reject normative expectations even if someone acts against them.<sup>150</sup> Normative expectations "signify the determination not to learn from disappointments."<sup>151</sup>

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<sup>146</sup> Halliday, at 282.

<sup>147</sup> Gunther Teubner, *Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria*, 5 EUR. J. SOC. THEORY 199 (2002) and see Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 6 MODERN L. REV. 11 (1998) and GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (1993).

<sup>148</sup> NIKLAS LUHMANN, *LAW AS A SOCIAL SYSTEM* (2004); Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 1988-1989; Niklas Luhmann, "What is the Case?" and "What Lies behind It?" *The Two Sociologies and the Theory of Society*, 12 SOC. THEORY 126 (1994) (trans. Stephen Fuchs).

<sup>149</sup> Niklas Luhmann, *A Sociological Theory of Law* 33 (1985).

<sup>150</sup> These are the expectations that we can change in the face of a 'disappointing reality'. For example, I will likely alter my expectations if I do not find my car in the expected parking spot. Cognitive expectations are expectations about 'knowing' only in the sense that I will allow myself to 'know' if I am wrong.

<sup>151</sup> Luhmann (1985), at 33.

Norms are thus ‘counterfactually stabilised behavioural expectations’ and they have unconditional validity independent of actual fulfillment or non-fulfillment.<sup>152</sup> In other words, the fact of whether the expectation is met or not met is not relevant. Stable normative expectations do not guarantee a *particular* future, but rather *manage* the unpredictability of the future, allowing for stability in the face of discrepant events.<sup>153</sup> Legal norms supervise this process, by creating counterfactual, disappointment-prepared and normative expectations.<sup>154</sup>

Law provides ‘security’ in protecting expectations and “immunizing” society against a necessary risk. Law does this not only by positing a general statement of expectations that do not have to be adjusted, but also by justifying conduct retrospectively and then, for example in adjudication, by determining which party will need to adjust expectations (changing seemingly normative expectations to cognitive expectations). Legal systems provide structures that are both formally operational and that are able to track and record “patterns of hope, experience and decisions.”<sup>155</sup> My sense is that legal norms are distinctive in their particular ability to combine past and present, practical and normative, skepticism and hope.

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<sup>152</sup> Ibid (“[O]ught’ expresses the expectation of validity without putting the quality of the expectation up for discussion”).

<sup>153</sup> Klaus A. Ziegert, *The Thick Description of Law: An Introduction to Niklas Luhmann’s Theory*, in *AN INTRODUCTION TO LAW AND SOCIAL THEORY* (Reza Banakar and Max Travers, eds. 2002) (“The functional effect of norms is not the projection of an ideal future but the projection of a ‘managed’ alternative to an unpredictable future”); Luhmann (1985), at 41 (an expectation that is not fulfilled has the danger of revealing itself as having only been an expectation, rather than fact. An un-fulfilled expectation “brings into focus again the original complexity of possibilities and the contingency of also being able to act differently”).

<sup>154</sup> Luhmann, at 73 (law is the social system that supervises normative expectations in the temporal, social and material dimensions. Expectations are stabilised in the temporal dimension if the expectation and the event are symbolically isolated from each other. Expectations are institutionalized in the social dimension when norms are integrated into a consistent context of meaning that generates consensus. Expectations that are institutionalized in the social dimension are supported by the expected consensus of third parties. Finally, norms that are “fixed through identical meaning within the *material* dimension” can be reciprocally confirmed).

<sup>155</sup> Peer Zumbansen, *Law’s Knowledge and Law’s Effectiveness: Reflections from Legal Sociology and Legal Theory*, 5:2 *COMPARATIVE RESEARCH IN LAW AND POLITICAL ECONOMY RESEARCH* 9 (Paper 11/2009).